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IN THE
Supreme Court of the United States

OCTOBER TERM, 1998

BERTRAM ROBERTS and HANNI ROBERTS,
Petitioners,

v.

FLORIDA POWER & LIGHT COMPANY,
Respondent.

On Petition for a Writ of Certiorari to the
United States Court of Appeals for the Eleventh Circuit

REPLY BRIEF FOR PETITIONERS

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REPLY BRIEF FOR PETITIONERS

1. Respondent's principal reason why this Court should deny review is an absence of a conflict among the circuits. In the petition, we acknowledged that most of the lower court precedents support respondent. However, we urged the Court, as it has done in recent cases, both in the preemption and non-preemption context, to grant review whether or not it perceives a significant conflict, because of the lower federal courts' manifest error in construing clear statutory mandates. Pet. 2-3 (citing, *e.g., Lexecon v. Milberg Weiss Berhsad Hynes & Lerach*, 118 S. Ct. 956 (1998), and *Lewis v. Brunswick Corp.*, 118 S. Ct. 439 (1997)).

In any event, respondent exaggerates the unanimity of authority in two ways. First, the lower courts are not uniform, with the Tenth Circuit holding that federal safety regulations do *not* set the standard of care in actions seeking damages from exposure to nuclear radiation, *see Silkwood v. Kerr-McGee Corp.*, 769 F.2d 1451, 1456-57 (10th Cir. 1985), and several district court decisions coming to the same or similar conclusions. *See* Pet. 12 n.2. Moreover, the Ninth Circuit's recent decision in *El Paso Natural Gas Co. v. Neztsosie*, 136 F.3d 610, 617 (9th Cir. 1998), *cert. granted*, 67 U.S.L.W. 3024 (U.S. Oct. 13, 1998) (No. 98-6), although it did not concern the applicable standard of care in public liability actions, recognized the narrow, targeted approach of 42 U.S.C. 2014(hh) and 42 U.S.C. 2210, which, taken together, mandate the use of state law, not federal law, in such actions.

Second, and more fundamentally, the ruling below is at odds with rulings of this Court. *See English v. General Electric Co.*, 496 U.S. 72 (1990); *Goodyear Atomic Corp. v. Miller*, 486 U.S. 174 (1988); *Silkwood v. Kerr-McGee Corp.*, 464 U.S. 238 (1984). Each of those decisions distinguishes damages actions, where state tort standards apply, from direct regulation of

nuclear power plants, which is governed by federal law. Thus, the Court has repeatedly held that, although direct state regulation of plant operations is preempted, Congress did not preempt damages suits, which exert only an indirect regulatory effect on nuclear plant operators.

As explained in more detail in the petition (at 19-21), *Silkwood* is particularly on point, because it held that even a judgment for $10 million in punitive damages was not sufficiently regulatory in character to be preempted in light of Congress's decision in the Price-Anderson Act ("PAA") to permit recovery under state-law tort principles. *Silkwood*, 464 U.S. at 256. Indeed, despite two dissents on the punitive damages question, all nine Justices indicated that no form of compensatory damages was preempted, even though the defendant had met applicable federal regulatory requirements, including the very federal "dose" regulations said to preempt petitioners' claims here. *Id.* at 244; *id.* at 275-76 (Powell, J., dissenting); *id.* at 261-62 & nn.2-5, 263-64 & n.12 (Blackmun, J., dissenting). One of the dissents took pains to point out that even state-law claims for compensatory damages based on strict liability, *i.e.*, without any showing of fault, let alone proof of violations of federal regulations, were not preempted by federal law. *See id.* at 276 n.3 (Powell, J., dissenting). Although respondent cites a grab-bag of facts that allegedly distinguish *Silkwood* from the present case (Opp. 11 n.4), none of them counters these basic holdings.

2. Respondent's fundamental attack on *Silkwood*, however, is that *Silkwood* pre-dates the PAA's 1988 amendments, which respondent claims effected a sea-change concerning the preemption of state law. As noted in the petition, this argument is critical to respondent given its concession below that, prior to 1988, individuals claiming

nuclear injuries "could recover under any theory of liability available in any of the 50 states." *See* Pet. 7 (quoting respondent's brief below).

Respondent relies on the fact that the 1988 amendments created a federal cause of action for all nuclear radiation torts, not just those concerning extraordinary nuclear occurrences ("ENOs"), as had been the case prior to 1988. Opp. 16-17. However, as explained in the petition, this change in the law had nothing to do with preemption of state substantive law, but rather was a response to the jurisdictional fiasco created by the Three Mile Island incident. All of the Three Mile Island suits had been consolidated in the District Court for the Middle District of Pennsylvania, where the accident occurred. After the Nuclear Regulatory Commission ("NRC") determined that the accident was not an ENO, the claims were dismissed for lack of subject matter jurisdiction. S. Rep. No. 218, 100th Cong., 1st Sess. 13 (1987), *reprinted in* 1988 U.S.C.C.A.N. 1488. To avoid repetition of this confusion and inefficiency, the 1988 amendments broadened the grant of federal jurisdiction to cover all nuclear incidents. *See* H.R. Rep. No. 104, 100th Cong., 1st Sess., pt. 1 at 18 (1987).

But when Congress created the federal cause of action, it did not say a word about abrogating state duties of care in public liability actions. In fact, to be absolutely certain—indeed, as if to anticipate the very argument now being advanced by respondent—Congress also added 42 U.S.C. 2014(hh), which provides that "the substantive rules for decision in [a public liability action] shall be derived from the law of the State in which the nuclear incident involved occurs, unless such law is inconsistent with the provisions of [42 U.S.C. 2210]." The intent of this "anti-preemption" provision, *California Fed'l Savings & Loan Ass'n v. Guerra*, 479 U.S. 272,

295-96 (1987) (Scalia, J., concurring)—that state, not federal, law applies—is clear on its face. And the legislative history strongly confirms that clear language: "Rather than designing a new body of substantive law to govern [public liability actions], ... the substantive rules for decision [are to] be derived from the law of the state in which the nuclear incident involved occurs." H.R. Rep. No. 104, *supra*, pt. 1 at 18.

Respondent has two responses to this statutory language. First, it argues that section 2014(hh)'s "inconsistent with" language refers not to the particular provisions of section 2210, but it "explicitly and implicitly embodies the entire federal framework governing nuclear safety." Opp. 22. Although some courts agree with that analysis, *see, e.g., O'Conner v. Commonwealth Edison Co.*, 13 F.3d 1090, 1100-01 (7th Cir.), *cert. denied*, 512 U.S. 1222 (1994), other courts, including the court of appeals below (Pet. App. 3a n.3), recognize that this "reading" of section 2014(hh) is flatly at odds with its language, which refers solely to the particular "provisions" of section 2210, not all of federal law. *See, e.g., Lujan v. Regents of Univ. of California*, 69 F.3d 1511, 1518 (10th Cir. 1995). Moreover, this argument makes no sense because if section 2014(hh)'s "inconsistent with" language were truly a reference to the whole body of federal law, that section's adoption of state law would be meaningless, since it is difficult to imagine what, if any, ingredients of state law would survive if preemption were that broad.

Second, respondent asserts that, even if section 2014(hh)'s "inconsistent with" language applies only to those items set forth in section 2210, state-law duties of care are nevertheless preempted. As the petition noted, there are a few provisions of section 2210 in which Congress specifically altered state tort law, such as the limitation on aggregate public

liability, 42 U.S.C. 2210(e), and the bar on punitive damages where the United States is obligated to make payments under an indemnity agreement, 42 U.S.C. 2210(s). *See* Pet. 14. But otherwise, no elements of state tort law are mentioned in section 2210.

Although none of the "provisions" of section 2210 mention the duty of care, respondent focuses on 42 U.S.C. 2210(a), which requires each nuclear plant licensee to maintain financial protection against suits, and which respondent claims manifests an intent to preempt state-law duties of care. Pet. 20-21. Although section 2210(a) is important to the PAA scheme, it has nothing to do with which substantive law applies in public liability actions. Indeed, the requirement of financial protection is an important component of the PAA precisely because it facilitates payment of damages (with indemnification from the federal government) in ENO cases, where state-law principles of strict liability apply, 42 U.S.C. 2210(n)(1), and in non-ENO cases, where state-law duties of care apply, whether they be based on negligence or strict liability. *See In re TMI Litigation Cases Consolidated II*, 940 F.2d 832, 863-64, 870-71 & n.3 (3d Cir. 1991) (Scirica, J., concurring).

Even farther afield is respondent's argument that state substantive law is ousted by section 2014(hh) because the words "Nuclear Regulatory Commission" or "Commission" are used fifty-seven times in section 2210. Opp. 22. Section 2210 is a lengthy provision whose principal purpose is to establish the complex insurance and indemnification scheme for public liability to *foster* recovery by persons injured by radiation emissions. *See* Pet. App. 16a-47a. Although petitioners have not double-checked respondent's math, we fail to see how statutory references to the NRC, the agency charged with administering the PAA's insurance scheme, have any bearing on

the question whether state substantive law applies in individual public liability actions anymore than mere reference to a federal regulator has had a bearing in other preemption contexts. For instance, the multiple references to the National Highway Traffic Safety Administration in the federal automotive safety law did not alter the Supreme Court's no-preemption holding in *Freightliner Corp. v. Myrick*, 514 U.S. 280 (1995), and the same can be said for the large number of references to the Food and Drug Administration's enforcement of the federal medical device law, *see* 21 U.S.C. 360c, and the no-preemption ruling in *Medtronic, Inc. v. Lohr*, 518 U.S. 470 (1996).

In this regard, a passage from this Court's recent decision in *Lexecon* fits respondent's argument like a glove: "The language [of the statute] is straightforward, and with a straightforward application ready at hand, statutory interpretation has no business getting metaphysical." 118 S.Ct. at 963. This Court need not decide whether counting-up the statutory references to the NRC is an exercise in metaphysics or simply one in diversion. In either event, respondent provides no reason to deviate from the plain language of 42 U.S.C. 2014(hh).

4. Respondent also argues that "state causes of action are not 'rules for decision'" (Opp. 17), thus suggesting that somehow the duty of care to be applied in a public liability action is not a "substantive rule for decision" under 42 U.S.C. 2014(hh). But if the standard of care is not a rule for decision, we cannot imagine what would be. The standard of care, whether it be based on negligence or strict liability, is the basic element of any tort suit. For this reason, respondent conceded below that "§2014(hh) specifies 'rules for decision' (*which is exactly what a standard of care is*)." Brief for Defendant-Appellee Florida Power & Light, at 22, in *Roberts v. Florida*

Power & Light Co., No. 97-5195 (11th Cir., dated Apr. 2, 1998) (emphasis added).

Moreover, the term "substantive rule for decision" has a particular importance in our jurisprudence. That language is reminiscent of *Erie Railroad Co. v. Tompkins*, 304 U.S. 64, 71 (1938), which itself concerned the applicable duty of care, *id.* at 70, and the Rules of Decision Act, 28 U.S.C. 1652, and shows the great deference that Congress accorded the states in fashioning rules for liability in damages actions involving nuclear power. It is hardly coincidence that section 2014(hh)'s language is virtually identical to that used in the Rules of Decision Act. *See* 28 U.S.C. 1652 ("the laws of the several states . . . shall be regarded as *rules of decision* in civil actions . . .") (emphasis added). In sum, the result sought by respondent here is no small incursion on state prerogatives, but an eradication of the core component of petitioners' claims: the substantive duty of care for determining liability.

5. Finally, we cannot allow to pass respondent's misleading discussion of the relationship between this case and this Court's recent grant of certiorari in *El Paso Natural Gas Co. v. Neztsosie*, 67 U.S.L.W. 3024 (U.S. Oct. 13, 1998) (No. 98-6), which concerns whether nuclear incident cases can be maintained in Indian tribal courts. *See* Opp. i. Our petition (at 25) noted the substantial overlap between *El Paso* and the present case. The first question presented in *El Paso* asserts that the tribal court had no jurisdiction because the plaintiffs' claims are preempted by federal law. *See* Pet. for Writ of Cert. in No. 98-6, at (i) (filed June 26, 1998). Indeed, the *El Paso* petitioners rely on the very same cases on which respondent here relies. *See id.* at 10. Nonetheless, the question whether a tribal court has *jurisdiction* in a public liability action could be resolved against the *El Paso* plaintiffs even if, as petitioners

here believe, the *applicable law* to be applied in such an action is state (or tribal) law. Thus, this Court should grant review and set this case for argument in conjunction with the argument in *El Paso* so that the Court may deal with the jurisdiction and preemption questions together. At the very least, the Court should hold this petition pending the decision in *El Paso*.

CONCLUSION

The petition for a writ of certiorari should be granted.

Respectfully submitted,

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